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No. 96-1523

In The

Supreme Court of the United States

October Term, 1996

WILLIAM E. FOSTER,

Petitioner,

vs.

CITY OF SOUTHFIELD, a municipal corporation, JANET TOBIN, Personal Representative of the Estate of ROLLIN G. TOBIN, Deceased, and ROBERT BLOCK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial established that Petitioner's comments caused actual and disruptive harm to the effectiveness of the city's operations, and Petitioner's assertions to the contrary are incorrect?

2. Whether the Sixth Circuit correctly applied the standard set forth in *Waters* to this matter?

3. Whether the circuits are consistently applying this Court's standard as set forth in *Waters*?

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Respondents, *City of Southfield, et al.*,[1] respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Sixth Circuit's Opinion below. That Opinion, was entered on December 20, 1996, is unreported, and has been reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

Petitioner William Foster's employment as Public Safety Reserve Coordinator/Fire Department was terminated after he continuously made public statements of unfounded racism and sexism within the City of Southfield's Fire Department. Such statements interfered with the City's operations and impaired Petitioner's ability to effectively perform his duties. Petitioner brought this action against his employer, City of Southfield, and two of its employees claiming that he was wrongfully discharged in retaliation for his exercise of his First Amendment rights and for engaging in activity protected under Michigan's Elliott-Larsen Civil Rights Act (hereinafter "ELCRA") and the Whistleblower's Protection Act[2] (hereinafter "WPA").

Trial commenced on July 12, 1994. The case was submitted to the jury on two claims: (1) termination in retaliation for free speech activity; and (2) ELCRA retaliation claim for opposing a violation of civil rights and participation in proceedings to vindicate rights. (Tr. 7/21/94, pp. 251-252). The court had earlier ruled that Petitioner's public statements touched on a matter of public concern.

After a 12-day trial, and after only one hour of deliberation,

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1. The full list of Respondents is included in the "Parties to the Proceeding" section of the petition for certiorari.

2. M.C.L.A. 37.2101, *et seq.* and M.C.L.A. 15.361, *et seq.*, respectively.

the jury returned a verdict for the Respondents finding that Respondents proved by a preponderance of the evidence that Petitioner was unable to effectively perform his job duties or that his statements interfered with the effectiveness of the City's operations. The jury also found that Petitioner did not prove by a preponderance of the evidence that Respondents retaliated against him because he engaged in activity protected under the civil rights law.[3]

The trial court thus entered Judgment in favor of the Respondents on August 9, 1994. (R:202). Petitioner's Motion for New Trial was denied on December 1, 1994. (R:211). Petitioner filed an appeal from the Judgment and the Order Denying Petitioner's Motion for New Trial with the Sixth Circuit Court of Appeals.

On appeal, Petitioner contended that the jury instructions improperly permitted Respondents to defeat a First Amendment claim solely on the basis of the City's opinion and conjecture as to the disruption caused by the Petitioner's speech and urged the appellate court to adopt a rule requiring a public employer to demonstrate objectively that an employee's speech caused actual harm. (Appendix to Petition, 6). The Sixth Circuit, applying the standard set forth in *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994), affirmed the trial court's jury instructions as correctly stating the standard and issued an unpublished opinion on December 20, 1996. (Appendix to Petition, 7).

Respondents submit that the Petition for Writ of Certiorari filed in this matter is without basis and should be denied.

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3. The trial court had stayed the WPA claim. After the jury returned a verdict in favor of Respondents on the Petitioner's claims under the First Amendment and ELCRA claims, the trial court dismissed the WPA claim. (Appendix to Petition, 4).

REASONS FOR DENYING THE WRIT

I.

THE EVIDENCE AT TRIAL ESTABLISHED THAT PETITIONER'S COMMENTS CAUSED ACTUAL AND DISRUPTIVE HARM TO THE EFFECTIVENESS OF THE CITY'S OPERATIONS, AND PETITIONER'S ASSERTIONS TO THE CONTRARY ARE INCORRECT.

In an effort to obtain review here, Petitioner has mischaracterized the nature of the question presented. The Petitioner's question presented suggests that Respondents offered absolutely no evidence at trial of the *actual* disruption caused by Petitioner's statements. However, the jury's verdict indicated that the Respondents had proven by a preponderance of the evidence that Petitioner was unable to effectively perform his job duties or that the Petitioner's public statements interfered with the effectiveness of the City's operations. (Appendix B to Petition for Writ, Memorandum and Order dated December 1, 1994, p. 2).

At trial, the jury heard evidence and testimony from several witnesses, saw and read the newspaper articles where Petitioner was quoted and saw the actual video tapes where Petitioner made the comments in question. (Appendix B, p. 2). The jury was also made aware of the City's efforts to integrate its Fire Department, and gained a complete picture of the relationship between Petitioner and the City, and its employees and department heads, and the disruptive effect the Petitioner's speech had on the City, its employees and their ability to carry out their functions.

Even so, both the District Court and the Sixth Circuit found that Respondents had presented sufficient evidence of actual disruption to the City's operation:

> The evidence presented by Defendants was sufficient to support a finding that Plaintiff's statements interfered with his ability to perform his job.

(Appendix to Petition, p. 7).

The District Court also found that Respondents produced substantial evidence to support the jury finding that "Plaintiff was unable to effectively perform his job duties" and "that the Plaintiff's public statements interfered with the effectiveness of the City's operations":

> There was ample evidence at trial to support the jury's findings that Plaintiff was unable to effectively perform his duties as Public Safety Reserve Coordinator/Fire Department once he had so bitterly and pervasively attacked the City officials with whom he was required to work and had denigrated the motives and efforts of these officials.

(Appendix B, p. 8).

Despite Petitioner's arguments and assertions to the contrary, the Respondents presented substantial, overwhelming and compelling evidence that Petitioner's speech caused a disruption by impeding his ability to perform his job of recruiting minorities into the Fire Department and by interfering with the operations of the City. Thus, the verdict rendered by the jury was supported by evidence of the actual and disruptive harm to the effective operation of the City's services, and Petitioner's assertion to the contrary is incorrect.

II.

THE SIXTH CIRCUIT CORRECTLY APPLIED THE STANDARD SET FORTH IN *WATERS* TO THIS MATTER.

In *Waters, supra,* this Court clearly enunciated the applicable First Amendment standard to determine whether an employee's speech is protected:

> To be protected, the speech must be on a matter public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

114 S. Ct. 1884.

The *Waters* plurality held that the government could fire an employee for disruptive speech based on the government's reasonable belief of what the employee said, regardless of what was actually said. In the instant case, there was no dispute as to what the Petitioner said, and, therefore, this part of the holding is inapplicable.

However, the *Waters* Court, applying the *Pickering*[4] balancing test held that Churchill's speech was unprotected because "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." 114 S. Ct. at 1890. The relevant factors to

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4. *Pickering v. Bd. of Education of Township High School District,* 391 U.S. 583, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

consider under the *Pickering* balancing test include: (1) the impact of the speech upon co-worker harmony; (2) whether the speech impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise; and (3) whether the statement interferes with the public employee's functions. *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987). The Court in *Waters* concluded that because a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters, the government employer "may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." *Id.* at 1887.

The Court in *Waters* recognized that greater deference must be given to the government when it acts as an employer rather than as a sovereign. It stated:

> [W]e have given *substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern,* and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

114 S. Ct. at 1887. (Emphasis added).

The *Waters* Court acknowledged that different standards must exist for review of the restraint of speech by the government as an employer than by the government as sovereign. 114 S. Ct. 1887. The government as an employer must have the power and ability to make efficient employment related decisions in order to assure its effective operation:

> The key to First Amendment analysis of government employment decisions, then, is this: the government's interest in achieving its goals as effectively and efficiently as possible is elevated for a relatively subordinate interest when it acts as sovereign to a significant one when its acts as employer. The government cannot restrict a speech of the public at large just in the name of efficiency. *But where the Government is employing someone for the very purpose of achieving its goals, such restrictions may well be appropriate.*

114 S. Ct. at 1888. (Emphasis added).

Respondents, as City and public servants, have a duty to the public in general and its citizens in particular to provide certain services. Petitioner was hired to efficiently and effectively aid Respondent in the successful delivery of the services, namely, to recruit minorities into the Fire Department, and was paid a salary to do so. Petitioner's second public television speech, on the steps, and in City Hall, detracted from the effective operation of City services. Additionally, Petitioner's repeated denunciations of his employer and co-workers effectively destroyed the relationship between Petitioner and the other department heads he was required to work closely with to effectuate the City's goals and services. Respondents had no choice but to restrain Petitioner. Any interest Petitioner as a citizen may have had in expressing himself on a matter he perceived to be of public concern was decisively outweighed by the City's interest as Petitioner's employer in maintaining control, discipline, and cohesion in the effective operation of the City's goals and services.

The standard Petitioner urges this Court to adopt would undo well established precedent of this Court, and severely undermine a government's ability as an employer to perform its duties, deliver its services, and manage its employees.

The Sixth Circuit properly looked at what Petitioner said, and how he said it, to affirm the jury's determination that Petitioner's speech caused a disruption by impeding his ability to perform his job and by interfering with the City's operations. The Sixth Circuit correctly applied this Court's holding in *Waters* to the instant matter, and the Petition should be denied.

III.

THE CIRCUITS ARE CONSISTENTLY APPLYING THIS COURT'S STANDARD AS SET FORTH IN *WATERS*.

Petitioner urges that his Petition must be granted because the various Circuits are interpreting *Waters* differently. This is a mischaracterization and an improper attempt to obtain review in this matter where review is unnecessary and inappropriate. All the cases that Petitioner has cited follow *Waters* and indicate that the government employer must have a reasonable basis for its actions.

In *Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 173 (1995),[5] the Second Circuit in applying *Waters*, held, that the University employer did not violate the First Amendment rights of a professor by reducing his term as department chair because of controversial speech, since they were motivated by the reasonable prediction of disruption to University operations. In its original decision, the Second Circuit held that the mere reasonable belief that speech

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5. Petitioner's Petition makes no reference to this Court's denial of Certiorari.

would interfere with the employer's operations was not enough to discipline an employee, unless the employee held a high level, policy-making position. *See Jeffries v. Harleston,* 21 F.3d 1238, 1246-47. The Supreme Court, __ U.S. __, 115 S. Ct. 502, 130 L. Ed. 2d 411, granted certiorari, vacated and remanded the matter for consideration in light of *Waters, supra.*

On remand, the *Jeffries* Court found that because the defendants had made a substantial showing at trial that their decision to limit Jeffries' term was based upon a reasonable prediction that the Albany speech would disrupt University operations, the District Court judgment was reversed. The *Jeffries* Court found that the government's burden was to make a substantial showing of likely interference and not actual disruption. *Jeffries, supra,* 52 F.3d at 13 *citing Waters, supra,* 114 S. Ct. at 1887. Commenting on *Waters,* the Court in *Jeffries* properly concluded:

> Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if:
>
> (1) the employer's prediction of disruption is reasonable;
>
> (2) the potential disruptiveness is enough to outweigh the value of the speech; and
>
> (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Jeffries, 52 F.3d at 13.

In the instant case the jury read the newspaper articles, saw the video tapes and heard the testimony of the witnesses and concluded that Petitioner was unable to effectively perform his job duties or that his statements interfered with the effectiveness of the City's operations. The jury also found that the Petitioner had failed to prove that the Respondents retaliated against him because he engaged in protected activity. (Appendix to Petition, p. 4).

In *Campbell v. Towse*, 99 F.3d 820 (7th Cir. 1996), *cert. denied*, __ U.S. __, __ S. Ct. __, 137 L. Ed. 2d 334, 65 U.S.L.W. 3630 (March 17, 1997),[6] the Seventh Circuit correctly applied *Waters* in determining whether the speech in question, that motivated the employer's reprimand, addressed matters of public concern and, if so, whether the speaker's interest in his expression was "outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Campbell, supra*, 99 F.3d at 826. Once it determined that the speech in question focused on a matter of public concern, the *Campbell* court then turned to the question of whether the speech so undermined the Police Department's interest in avoiding the disruption of its command structure that the Police Chief's suspension of Campbell was permissible under the First Amendment. 99 F.3d at 828.

The Seventh Circuit court, in making that determination, looked to such factors as the reasonable likelihood that the speech would create problems in discipline or cause disharmony, whether the employment relationship ostensibly undermined by the speech, was one where personal loyalty and conflict are established, and whether the speech impeded the employee's ability to perform his duties. 99 F.3d at 829.

The court found determinative, in viewing the entire context in which the underlying dispute arose, that Campbell's

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6. Petitioner's Petition again makes no reference to this Court's denial of Certiorari.

insubordinate attitude and behavior amounted to more than a philosophical disagreement sufficient to cause the Police Chief to not only lose confidence in the police officer but also to doubt his loyalty. *Id.* at 829. In concluding that Campbell's suspension by the Police Chief did not violate Campbell's First Amendment rights, the Seventh Circuit held that any interest Campbell had in expressing himself as he did was outweighed by the Police Chief's interest in maintaining control and discipline over the department and preserving both departmental discipline and cohesion. *Id.* at 830.

In the instant case, Respondents produced evidence sufficient to support the jury's finding that "Plaintiff was unable to effectively perform his job duties" and "that the Plaintiff's public statements interfered with the effectiveness of the City's operations." Specifically, the trial court noted that Petitioner was unable to effectively perform his job duties once he so bitterly and pervasively attacked the City officials with whom he was required to work and had denigrated the motives and efforts of these officials. (Appendix B, p. 8).

In *Andersen v. McCotter,* 100 F.3d 723 (10th Cir. 1996) the Tenth Circuit, as well, consistently applied *Waters.* The Tenth Circuit concluded that defendant had offered no evidence of potential disruption, but had merely pointed to its code of conduct for the proposition that the speech in question interfered with the regular operations of the department, and had thus not met its burden to justify the challenged discharge on legitimate grounds.

The Tenth Circuit, in holding that defendant had failed to sustain its burden, has shown that the Circuits are not interested in merely rubber stamping the employment-related decisions of the government employer. As Petitioner is undoubtedly aware, the Circuits are not split. Rather, the Circuits are merely probing

into these employment related decisions to verify that there exists a reasonable basis for the prediction of disruption upon which the decision was based and will not tolerate situations where this burden has not been met.

Similarly, in *Watters v. City of Philadelphia,* 55 F.3d 886 (3rd Cir. 1995) the court found that the employee's statements, which touched on a matter of public concern were protected speech because the department's interest did not outweigh the employees. In reaching this conclusion, the Circuit found determinative that nothing the plaintiff in *Watters* was reported to have said impugned the integrity of his superiors, that the plaintiff in *Watters* had made similar comments in a previous article and the City never claimed any disruption from these comments, and there was no evidence that the plaintiff in *Watters* engaged in the type of complaining and negative criticism of his supervisors within the workplace, that this Court found likely to disrupt the working relationships as in *Waters.*

In reaching this decision, the Third Circuit in *Watters* first looked to *Waters* for the appropriate analysis and standard and then to *Rankin, supra* to list the relevant factors to establish the defendant's contention of disruptiveness. The Court then determined that the trial court had failed to review or analyze any factors as propounded in *Waters* or *Rankin*, but instead had focused solely on *Watters'* use of the word "crisis" in the article and in his testimony.

The *Watters'* decision is clearly factually distinguishable from both the instant case and the cases from the other Circuits. In the instant case, Respondents have presented strong, ample and compelling evidence that the Petitioner's speech caused a disruption by impeding his ability to perform his job of recruiting minorities into the fire department and by interfering with the operations of the City. The jury believed the Respondents' witnesses, as did both the District Court and the Sixth Circuit.

In *Moore v. City of Wynnewood*, 57 F.3d 924 (10th Cir. 1995), the Tenth Circuit, consistent with *Waters*, concluded that *Moore*'s interest in voicing his opinion about a fellow police officer and the police department's race relations problems at a city council meeting, while in uniform and on duty, did not outweigh the defendant's interest in controlling not only who purports to speak on behalf of the city, but also in safeguarding the operations of the department. The Tenth Circuit stated that there is no requirement for the government as an employer to be compelled to wait for a speech to actually disrupt core operations before taking action, as long as the government's concerns about the speech are reasonable and formed in good faith.

In *Moore*, the Tenth Circuit found significant the close working relationships within the small, six-member department. In the instant case, the jury heard testimony from the City Manager, Public Safety Director, Personnel Manager, Fire Chief, and Civilian Operations Coordinator, who were all required to work closely with Petitioner in the implementation of the fire reserve and cadet programs. Each witness testified that Petitioner's speech totally disrupted their ability to work with him in trying to implement the City's goals and programs.

In *Wright v. Illinois Dept. of Children and Family Services*, 40 F.3d 1492 (7th Cir. 1994), the Seventh Circuit concluded that the instances of speech which in part formed the basis of lawsuit were not expressions on matters of public concern. Because the trial court had concluded that Petitioner's speech did not touch upon matters of public concern, this holding in *Wright* is inapplicable to the instant case.

A review of all the cases cited by Petitioner demonstrates that the Circuits are consistently applying the standards and analysis set forth in *Waters* and are placing on the government

employer, relative to its employment related decisions, the burden to establish a reasonable basis of the potential for disruption before allowing the government as an employer to restrict the speech of an employee. For instance, the Second Circuit correctly applied these standards in *Jeffries* when it reversed its prior ruling in light of this Court's decision in *Waters*. The Sixth Circuit has correctly done so in the instant matter as well.

Petitioner has not shown any real, or perceived, conflict between the decisions below and any opinions of other Circuits or this Court. The arguments are frivolous and absolutely devoid of merit.

Furthermore, Petitioner has not shown any reason to do away with the standard and analysis this Court has established in *Waters*.

CONCLUSION

The Petition for Certiorari filed in this matter is without basis and should be denied.

Respectfully submitted,

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